No. 01-50

SUPREME
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In The

Supreme Court of the United States

MATTHEW MILSTEAD, Administrator of the Estate of Mark Milstead,

Petitioner,

v.

CHAD KIBLER; SCOTT PROCTOR; LESTER WHETZEL,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Just after midnight on October 26, 1996, three police officers arrived at a house in rural Shenandoah County, Virginia. The police dispatcher reported that a caller said he had been shot in the throat and his girlfriend stabbed. (J.A. 556, 601). The officers immediately found signs confirming that a violent crime was in progress--blood on a vehicle and on the steps. (J.A. 127, 247). In response to calls for help from inside, one officer kicked the door open, and immediately encountered a gun pointed at his face. (J.A. 256). He fired his weapon, apparently without effect, fell backwards and sought cover. (J.A. 256-257). Someone inside yelled threats at the officers and seconds later a man crashed through the metal storm door at a run in the direction of an officer standing at the corner of the house twelve to fifteen feet away. (J.A. 163, 507). Shenandoah County Sheriff's Deputy Chad Kibler, confronted with the necessity of making a split-second decision, pulled the trigger and shot Mark Milstead[1] twice in the chest. (J.A. 181-182). Milstead died from the injuries.

Information gathered after the shooting revealed that Milstead was the homeowner, and that an armed intruder, Steven Ramey, broke into the house he shared with Jill Cardwell. (J.A. 86). Ramey previously had been engaged in a romantic relationship with Cardwell, which ended when Cardwell left Ramey for a former boyfriend--Milstead. That night, after entering the house, Ramey shot and killed Jill Cardwell, and a gunfight ensued between Milstead and Ramey. (J.A. 86). During that fight, Ramey shot Milstead once in the neck, and Ramey was shot six times. (J.A. 86).

After the initial gunfight, Ramey left the house, and at 12:14 a.m. on October 26, Milstead placed an emergency 911 call to the Shenandoah County Emergency Operations Center (EOC). (J.A. 86, 556). During the 911 telephone call,

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[1]Milstead and his survivor are referred to herein as "Milstead."

Ramey returned to the house and the struggle resumed. (J.A. 86, 87, 556). At approximately 12:27 a.m., while the fight between Ramey and Milstead continued, Shenandoah County Sheriff's Deputies Kibler and Proctor, along with Woodstock Town Police Officer Whetzel arrived at the scene. (J.A. 87). The 911 tape and the testimony of the officers show exactly what the officers knew about the situation before they arrived at the scene.

The gist of Milstead's claim on appeal is that despite the report of a shooting, blood on the van and on the steps, the gun pointed at Proctor, the shots fired, the screamed threats directed at officers from inside the house, and a man crashing through the door of the house at a run in the direction of Kibler who was less than fifteen feet away, Proctor and Kibler should have willingly "taken a bullet" in order to avoid civil liability. This is precisely the kind of choice which this Court has acknowledged that police do not have to make.

The undisputed evidence in this case shows that the three officers had probable cause to believe that one or more of the subjects they encountered posed a threat of serious physical harm to them or to others. Probable cause existed at all times up to and even after the shooting. This is dispositive of the Fourth and Fourteenth Amendment "use of deadly force" claims. The fact that Kibler was mistaken as to whether Milstead actually posed such a threat does not change the result. His decision to fire was a reasonable response to the situation facing him at the time. The objective reasonableness of their actions requires that they be afforded the protection of qualified immunity.

Milstead's factual recitation provides the backdrop and the foundation for each of his arguments. The recitation, however, fails to reflect the facts found in the record. Two primary examples, upon which Milstead repeatedly relies throughout his argument are (1) the claim that Proctor was able to immediately determine who was the innocent victim and who was the armed intruder; and

(2) that Kibler shot Milstead even though Milstead's hands were in plain view and he saw that he was unarmed. Neither is reflected in the record. These assertions are cobbled together from "grains of truth." Proctor did see two people when he entered the house, and one did point a gun at him. (J.A. 253-256). Milstead's hands were not clearly visible and Kibler did not see that he was unarmed. (J.A. 187). There was one dim light behind Milstead, and Kibler could only approximate how his hands were held--near his chin, as one might hold a gun with both hands--and he *did not* see whether he had anything in his hands. (J.A. 221-222). Further, because of the speed with which Milstead exited the house, crashing through the door and running in Kibler's direction, he had no opportunity to inquire or warn before deciding to fire. (J.A. 226).

The qualified immunity standard established by this Court has been carefully crafted to achieve the proper balance between the interest in preventing and compensation for constitutional violations and the interest in avoiding the over-deterrence of the exercise of independent judgment by law enforcement officers. The application of qualified immunity here works no injustice.

ARGUMENT

This case is indeed unusual in that the testimony of the officers about what happened at the scene is supplemented by the extraordinary 911 tape which caught on audiotape the events which occurred after the 911 call was made. (J.A. 545, 600-601). That tape is instructive, because it is an objective account of what happened on the night of the shooting. Unlike most cases of this nature, it is not necessary to rely upon the account of events reported by officers.

The tape clearly shows the rapidity with which events unfolded after the police officers arrived on the scene. Armchair analysis of the events may result in

detailed and sterile descriptions of the events. Descriptions which suggest that there was time for deliberation, consultation and carefully planned action. The tape exposes the fallacy of this kind of analysis.

The record also exposes the erroneous factual assertions upon which Milstead relies. Milstead attempts to portray Deputies Kibler and Proctor as a pair of bumbling cowards. In fact, these two officers showed great bravery in their actions on October 26. The officers were aware that at least one person was armed, and yet when they heard someone inside the house screaming for help, the officers kicked in the door, ready to face the unknown, and willingly placing themselves in harm's way.

Milstead asserts as fact that Proctor and Kibler knew before arriving at the scene that the tactical situation they would face consisted of "two innocent victims" being attacked by a single armed intruder. In fact, they knew no such thing. The officers knew little more than that a violent fight had occurred. (J.A. 243-244, 556, 601). They did not know whether it was a domestic matter, whether drugs or alcohol were involved, whether it was a breaking and entering, who was the initial aggressor, how many people were armed, or who might be hostile to the officers. (J.A. 245). Notwithstanding the limited information they possessed, the officers made what surely was one of the most difficult decisions of their lives by deciding to kick in the door. (J.A. 251-252). They did their duty.

After the door was kicked in, Milstead says that Proctor immediately learned all of the necessary tactical information he may have lacked before. He says that since Proctor knew that there was an "innocent victim" in the house, he immediately identified and distinguished between the two men he saw inside. In fact, Proctor did not know or understand that there was an "innocent victim" inside. (J.A. 252-255). All he was able to determine in the instant he was inside was that there was someone pointing a gun at his face.

Milstead then launches his assault upon Kibler's actions. Kibler did get into the doorway of the house, but when Proctor began backing and firing, Kibler was forced out of the doorway. (J.A. 148-150). Kibler immediately took up his position at the corner of the house–twelve to fifteen feet from the door. (J.A. 163, 507). Milstead says Kibler positioned himself under cover, that he never faced any danger, and that he clearly saw that the person exiting the house was not armed. These assertions are detached from the evidence and reality.

When someone crashed through the metal storm door running in Kibler's direction, he had but an instant to decide whether it was friend or foe. He knew that if it was a foe, he had to fire immediately or be prepared to die. It was the middle of the night, there was one dim bulb burning behind the person coming through the door. Kibler could see the general location of his hands–in the area of his chin, but he could not tell whether he had a gun. (J.A. 187). Kibler explained that he knew that the 911 caller had been shot in the throat by someone, and did not believe that someone who had been shot in the throat would crash through the door. (J.A. 226-227). Kibler saw Proctor fire his weapon yelling "man with a gun," and fall backwards out of the doorway as if he had been shot. (J.A. 154-155). He made a split-second decision and fired. From the comfort of a law office it is easy to say that Kibler made the wrong choice. It was not quite as simple on October 26. It is not a choice upon which Kibler can be held liable.

I. SUMMARY JUDGMENT BELOW WAS BASED ON THE UNDISPUTED FACTS, NOT ON MISTAKEN APPLICATION OF FOURTH AMENDMENT JURISPRUDENCE

Count I of the Amended Complaint asserts that the "use of deadly force against Milstead, when he was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants or others, violated

Milstead's rights as guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution." Milstead argues that the Fourth Circuit is mistaken in its application of the teachings of Graham v. Connor, 490 U.S. 386, 397 (1989).

Milstead argues that as is evidenced by its decision in Greenridge v. Ruffin, 927 F.2d 789 (4th Cir. 1991), the Fourth Circuit is among a large majority of Circuits which erroneously conclude that the analysis of the "reasonableness" of an officer's particular use of force focused on the reasonableness of the conduct "at the moment" when the decision to use certain force was made. Below, Milstead argued that, in determining reasonableness, the chain of events ought to be traced backward to any earlier misconduct or mistake by the officer. Here, in addition to suggesting that Milstead's death could be traced backwards to mistakes made earlier by the officers, Milstead also argues that in evaluating Kibler's use of force, the "totality of the circumstances" considered by the court should include the perceptions of his partner, Proctor.

In Greenridge, the Fourth Circuit actually affirmed the exclusion of evidence that a police officer allegedly violated standard police procedure prior to a shooting on the grounds that events which occurred before were not probative of the reasonableness of the officer's decision to fire the shot. 927 F.2d at 792.

In Graham, this Court held that the proper application of the "objective reasonableness" test "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." Graham, 490 U.S. at 396.

The reasonableness of the officer's actions "must be judged from the perspective of a reasonable officer *on the scene*, rather than with the 20/20 vision of hindsight." Most

significantly, the Court further elaborated that "reasonableness" meant the "standard of reasonableness *at the moment*." Id. (emphasis added).

This Court seemed to have relied upon the "split-second judgments" that were required to be made and focused on the reasonableness of the conduct "at the moment" when the decision to use certain force was made. Applying this reading to the present case, the Graham decision contradicts Milstead's argument that, in determining reasonableness, the chain of events ought to be traced backward to the officer's misconduct.

Applying these principles to the facts in this case, there is no basis for contending that the courts below have misapplied the "objective reasonableness test" in this case. Officers are entitled to qualified immunity for their respective roles in the shooting of Milstead, notwithstanding the claim that Milstead was mistakenly shot by Kibler. The claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis. This assertion of fact is one made by Milstead with the benefit of 20/20 hindsight, specifically for the purpose of second guessing the reasonableness of the officers' actions at the time. This is precisely the type of exercise against which the doctrine of qualified immunity is intended to protect.

Everyone--Mark Milstead included--made split-second judgments on the night of October 26. (J.A. 680). Armchair analysis now reveals that a different judgment by any of the actors at any stage might have altered the final outcome of that night. Id. As for Mark Milstead, the District Court did comment upon his critical choices and split-second judgments. First, it was Mark Milstead, who yelled at the deputies to come in the house. Id. Almost immediately after Proctor kicked the door in, Milstead

simply jumped off Ramey and yelled that he had a gun. Id. Immediately, Ramey came up with a weapon and pointed it at Proctor. Id. All of these events took a split second.

Utilizing the same hindsight which Milstead seeks to have the Court apply to this case, it is equally possible to argue that if Milstead had just held onto Ramey until the officers could get into the house, they *would* have been able to assist him in subduing Ramey, and in preventing Ramey from firing at anyone. Milstead made a split-second judgment which, with the benefit of 20/20 hindsight, now can be said was the wrong choice. Milstead's decision to let go of Ramey turned a tense situation into a crisis. His split-second decision should be judged no more or less harshly than those of the officers.

Kibler's decision to fire his weapon must be viewed as police officers would have viewed it. Clearly, a reasonable officer could have believed that it was the suspect coming out of the house, and that he was armed, dangerous and meant to harm the police officers. Clearly, a reasonable officer could have believed that it was necessary to respond with deadly force to Milstead's sudden appearance when he came out of the house without warning, explanation, announcement or a request that they hold their fire.

Although in recounting these events orally or on paper it may be easy to make them sound as if they were slowly unfolding in a manner that provided Kibler and the other officers the luxury of time to confer, deliberate and consider their options before settling on a plan of action, such was not the case here. The EOC/911 tape demonstrates the fallacy of a suggestion that this scene was anything other than volatile and chaotic. It demonstrates the absolute necessity of split-second decision-making by the officers. The tape also buttresses the conclusion that Kibler's actions were objectively reasonable. Based on these facts and viewed from the perspective of the officers, the

shooting "could reasonably have been thought consistent with the rights [the officers] are alleged to have violated." Anderson v. Creighton, 483 U.S. 638 (1987).

The reasonableness analysis requires the application of qualified immunity to the actions of the police officers in this case. The evidence shows clearly that a reasonable police officer could have been justified in believing that the suspect, and even Milstead posed a threat of serious physical harm to them or to others. Similarly, given the circumstances, Kibler's apparent mistake in firing at Milstead was understandable, and was a reasonable response to the situation facing the officers at the time.

In a related argument, Milstead also objects to the Fourth Circuit's application of the "objective reasonableness" test because it has observed that "the objective facts 'must be filtered through the lens of the officer's perceptions at the time of the incident in question.'" Milstead v. Kibler, 243 F.3d 157, 163 (4th Cir. 2001).

Such a perspective serves two purposes. First, using the officer's perception of the facts at the time limits the second guessing the reasonableness of actions with the benefit of 20/20 hindsight. Graham, 490 U.S. at 396. Second, using this perspective limits the need for decision-makers to sort through conflicting versions of the "actual facts, and allows them to focus instead on what the police officer reasonably perceived." Gooden v. Howard County, MD, 954 F.2d 960, 965 (4th Cir. 1992) (*en banc*).

The claims that Milstead was unarmed and did not pose a threat of death or grievous bodily harm to any of the defendants, are quite irrelevant for purposes of the constitutional analysis. The facts must be "filtered through the lens of the officers' perceptions at the time." This assertion of fact is one made by the plaintiff with the benefit of 20/20 hindsight, specifically for the purpose of second guessing the reasonableness of the officers' actions at the time.

II. THE COURT NEED NOT DISCARD ITS QUALIFIED IMMUNITY JURISPRUDENCE

Milstead argues in his brief that this Court should use this case to rewrite the nearly 35 years of case law underlying the doctrine of qualified immunity. Milstead suggests that it is time for this Court to revisit the standards it has established for excessive force cases, specifically to determine whether qualified immunity should be retained, and if so, to delineate its separate function. (Petition, p. 20). Petitioner asks this Court to "grant review to clarify the relationship between the Fourth Amendment standards, with or without qualified immunity, and the summary judgment standards of Civil Rule 56." (Petition, p. 21).

This Court, however, has just addressed and clarified this relationship. See Saucier v. Katz, 121 S.Ct. 2151 (2001). In Saucier, this Court held that a "ruling on qualified immunity requires an analysis not susceptible of fusion with the question whether unreasonable force was used in making the arrest." Id. In fact, the Saucier decision addresses virtually every one of the Petitioner's arguments in favor of granting a writ of certiorari.

Petitioner argues that there has been a misapplication of dicta from this Court's prior decisions which has resulted in a mistaken emphasis by many courts upon "the importance of summary disposition in appropriate cases to vindicate the policies of qualified immunity." (Petition, pp. 19-20). In Saucier, this Court rejected the Petitioner's premise, holding in a Fourth Amendment excessive force case that "[w]here the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings so that the costs and expense of trial are avoided where the defense is dispositive. Qualified immunity is 'an entitlement not to stand trial or face other burdens of litigation.'" Saucier, 121 S. Ct. at 2156 (quoting Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). The direction provided on this issue by the Court in

Saucier is not dicta. Furthermore, it is clear that to the extent that any confusion existed in lower courts, that now has been adequately addressed.

The foundation of Milstead's argument here, as elsewhere, rests upon his characterization of the events of October 26. He argues that if qualified immunity can apply to the facts of this case, it is an unjust doctrine which therefore must be modified or discarded. Aside from the obstacles obvious to discarding a long entrenched and well-developed doctrine of Constitutional law, Milstead faces other obstacles. Principal among his problems, is that the "facts" he recites were properly rejected by the District Court as unsupported by any evidence as has been discussed at great length above. Proctor did not "know exactly who was who;" he did not know whether there was an innocent victim, or if so who it was. Kibler was not actually inside the house, and never had the same view as Proctor. Kibler and Proctor never had an opportunity to confer and exchange information about what each saw. Likewise, Kibler did not see that the person exiting the house had no gun; he did have reasonable grounds to believe that he and the others (the officers and any innocent victims) were in imminent danger of death or great bodily harm; and Kibler was partially behind cover, but that provided little comfort in the face of what he reasonably believed was an armed killer charging at him from less than fifteen feet away.

Without distorting the facts, there is no viable argument that the application of qualified immunity works an injustice here. At least no more injustice than that found in any tragedy, as the Fourth Circuit acknowledged in Belcher v. Oliver, 898 F.2d 32, 35 (4th Cir. 1990):

> We do not for one moment dismiss the pain of these events for those involved. We hold only that their tragic character cannot be ameliorated by efforts to affix constitutional blame where it does not belong.

Id.

CONCLUSION

For the foregoing reasons, this Court should deny Petitioner's petition for a writ of certiorari.

Respectfully submitted, Dated: August 9, 2001

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